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In The

Supreme Court of the United States

October Term, 1996

CHARLES R. FETTY, ET AL.,

Petitioners,

vs.

PENSION BENEFIT GUARANTY CORPORATION

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. May the Pension Benefit Guarantee Corporation ("PBGC") ignore pension plan provisions and the statutes and regulations governing the PBGC, as well as the congressional intent behind creation of the PBGC, in denying early retirement benefits which are fully vested and nonforfeitable pursuant to the plan terms and existing regulations to pension plan participants?

LIST OF ALL PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed appear in the caption of the case.

LIST OF PARENT OR SUBSIDIARY COMPANIES

There are no parent or subsidiary companies to be listed.

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Petitioners Charles R. Fetty, et al. (hereinafter referred to collectively as "Petitioners"), respectfully petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OFFICIAL AND UNOFFICIAL REPORTS OF THE DECISION

The opinion of the Court of Appeals is unreported and is reproduced in the Appendix filed herewith at App. 1. The opinion of the district court is reported at 915 F.Supp. 230 and is reproduced in the Appendix filed herewith at App. 7. The initial determination of the PBGC dated December 23, 1994 is unreported and is reproduced in the Appendix filed herewith at App. 21.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The judgment of the Tenth Circuit Court of Appeals was entered on December 23, 1996. The petitioners timely filed a petition for rehearing and suggestion for rehearing en banc which the Tenth Circuit Court of Appeals denied on February 4, 1997. Notification pursuant to Supreme Court Rule 29.4(a) was made to the Solicitor General of the United States and upon the PBGC.

STATUTES INVOLVED

The pertinent provisions of 5 U.S.C. § 706, 29 U.S.C. § 1002(19), 29 C.F.R. § 2613.3 and 29 C.F.R. § 2613.6(a) are set forth in the Appendix filed herewith at App. 33.

STATEMENT OF THE CASE

The Petitioners were employees of CF&I Steel Corporation ("CF&I"), located in Pueblo, Colorado. CF&I

instituted and sponsored a pension plan ("Plan") covering the employees of CF&I and certain subsidiaries, including the Petitioners, pursuant to a Pension Agreement between CF&I and the United Steelworkers of America, effective July 31, 1980. The plan was amended and restated effective January 1, 1988 and January 1, 1989. The plan was covered by and subject to the requirements of the Employee Retirement Income Security Act of 1974, as amended ("ERISA").

The plan specified eight (8) bases under which an employee of CF&I or one of the covered subsidiaries could draw a pension: "Normal Retirement," "62/15 Retirement," "30 Year Retirement," "Permanent Incapacity Retirement," "70/80 Retirement," "Rule-of-65 Retirement," and "Deferred Vested Pension." Each of the foregoing types of retirement varied in the requirements which had to be met prior to a covered employee being eligible to draw a pension.

Under 29 U.S.C. §1342, the PBGC terminated the plan on or about March 19, 1992 and assumed trusteeship of the plan, guaranteeing and ensuring payment of benefits classified as nonforfeitable under Title IV of ERISA to which the Petitioners, other covered employees of CF&I and related subsidiaries, and their beneficiaries were entitled. The issue to then be determined was what benefits, if any, were guaranteed. Petitioners' contended that they were entitled to Rule-of-65 benefits and/or 70/80 Retirement benefits pursuant to the Plan and the applicable statutes and/or regulations, and as such made application for the benefits to which they were entitled. PBGC denied the applications, claiming that the benefits being applied for were forfeitable under the terms of the plan, and as such, were not guaranteed. As a result of this denial, and the indication that no further steps need be taken by the Petitioners to exhaust their administrative remedies, the instant action was commenced on or about February 10,

1995 pursuant to 29 U.S.C. § 1303(f)(2), 28 U.S.C. § 1331 and 28 U.S.C. § 2201. PBGC answered the suit on or about April 27, 1995, admitting (in germane part) the operative facts, including that it had an obligation to pay nonforfeitable benefits due under the terms of the plan to the Petitioners. The denials of the Petitioners' claims for benefits were upheld by the United States District Court for the District of Colorado ("Trial Court") and the United States Court of Appeals for the Tenth Circuit ("Tenth Circuit"). It is this denial that the Petitioners request be reviewed by this Court.

Under the plan provisions at issue, to be eligible for a Rule-of-55 pension benefit, an employee needed to meet the criteria of Section 5.07 of the Plan, which provides:

> Any Participant (i) who shall have had at least twenty (20) years of Continuous Service as of his last day worked, (ii) who has not attained the age of fifty-five (55) years, and (iii) whose combined age and years of Continuous Service shall equal sixty-five (65) or more but less than eighty (80), and
>
> > (a) whose Continuous Service is broken by reason of a layoff or disability, or
> >
> > (b) whose Continuous Service is not broken and who is absent from work by reason of a layoff resulting from his election to be placed on layoff status pursuant to the provisions of corporate policy of the Basic Agreement applicable to the event of a permanent shutdown, or

(c) whose Continuous Service is not broken and who is absent from work by reason of a physical disability or a layoff other than a layoff resulting from an election referred to above and whose return to active employment is declared unlikely by his Employing Company, or

(d) (not applicable after January 1, 1988) shall be eligible to retire on or after October 31, 1985, and shall upon his retirement (hereinafter "Rule-of-65 retirement") be eligible for a pension.

For an individual to be eligible for a 70/80 Retirement, pursuant to Section 5.06 of the plan, a covered employee had to meet the following requirements:

Any Participant who has not attained the age of sixty-two (62) years and who shall have had at least fifteen (15) years Continuous Service, and (i) shall have attained the age of fifty-five (55) years, and whose combined age and years of Continuous Service shall equal seventy (70) or more, or (ii) whose combined age and years of Continuous Service equal eighty (80) or more, and:

(a) whose Continuous Service is broken by reason of a permanent shutdown of a plant, department or subdivision thereof, or by reason of a layoff or physical disability, or

(b) whose Continuous Service is not broken and who is absent from work by reason of:

(1) A layoff resulting from his election to be placed on layoff status in accordance with policies and procedures of his Employing Company or pursuant to the provisions of the Basic Agreement or Union Pension Agreement in the event of a permanent shutdown, or

(2) A physical disability or a layoff other than a layoff resulting from an election referred to above and whose return to active employment is declared unlikely by his Employing Company, or

(c) which Continuous Service is not broken and who, while on layoff status by reason of his election to be placed on such status pursuant to the provisions of the Basic Agreement applicable in the event of a permanent shutdown, accepts a job with an Employing Company, and prior to the expiration of ninety (90) consecutive calendar days from the first day worked on such job, elects to retire, or

> (d) (not applicable after January 1, 1988)shall be eligible to retire on or after October 31, 1985, and shall upon his retirement (hereinafter "70/80 Retirement") be eligible for a pension.

PBGC admitted that the Petitioners, as of March 19, 1992 had met the age and service requirements outlined in the foregoing plan. PBGC also admitted that on or about March 4, 1993, under a plan approved by the Bankruptcy Court, the assets of CF&I were sold to another entity unrelated to the preceding company, CF&I shut down, and all personnel, including Petitioners, were laid off as of that date from CF&I's employment.

REASONS FOR GRANTING THE WRIT

It is undisputed that the Petitioners ultimately met all of the requirements of either § 5.06 or § 5.07 of the Plan. The only question to be answered is the timing and effect of the layoff. Specifically, did the layoff referred to have to occur prior to plan termination for the benefits to be nonforfeitable and thus guaranteed by PBGC, or were the benefits nonforfeitable and guaranteed irrespective of when the plan termination occurred. While this issue appears rather straight forward and fact driven, the determination of this issue is driven by the statutes, regulations and the legislative intent behind the creation of the PBGC. Resolution of this issue will have a profound effect on individuals the PBGC is intended to protect, and the very existence of the PBGC. As such, this Court should grant this Petition, as the Tenth Circuit has decided an important question of federal law that has not been, but should be settled by this Court.

A. STANDARD OF REVIEW

PBGC's determination of entitlement to benefits must be upheld unless it is arbitrary, capricious, an abuse of discretion or not in accordance with the law. 5 U.S.C. § 706(2)(a). In addition, please see *American Petroleum Inst. v. EPA*, 540 F.2d 1023, 1029 (10th Cir. 1976); and *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574-1575 (10th Cir. 1994). In determining the foregoing, the Court is to render an independent decision. *Id.* at 1580. Under the arbitrary and capricious or abuse of discretion standard, this Court must evaluate whether the agency examined the relevant data and articulated a rational connection between the facts found and the decision rendered. *Id.* at 1574.

B. THE COURT OF APPEALS ERRED IN UPHOLDING PBGC'S DEPRIVATION OF PENSION PLAN PARTICIPANTS FULLY VESTED, NONFORFEITABLE EARLY RETIREMENT BENEFITS IN CONTRAVENTION OF THE PLAN PROVISIONS, APPLICABLE STATUTES AND REGULATIONS, AND CONGRESSIONAL INTENT

In delivering its opinion, the Tenth Circuit made the following determination:

> We agree with the district court that PBGC correctly interpreted applicable law in its decision to deny plaintiffs' applications for 70/80 and Rule-of-65 benefits under the Plan. PBGC's action was neither arbitrary nor capricious. Plaintiffs had not suffered a break in continuous service by reason of a layoff as of the

> Plan termination date. See 29 C.F.R. § 2613.3 We reject plaintiffs' attempt to equate "layoff" in sections 5.06 and 5.07 of the Plan with "retirement" in 29 C.F.R. § 2613.6. Therefore, we AFFIRM for substantially the reasons given by the district court.

Fetty, et al. v. Pension Benefit Guaranty Corporation, No. 96-1106 (10th Cir. 1996), App. at page 1. This determination, however, is contrary to the applicable law, and the facts of this case.

The PBGC, upon taking over a plan as trustee, is to determine which pension benefits are guaranteed and to pay those benefits which are in fact guaranteed. 29 C.F.R. § 2613.3. The only possible prohibition to the Petitioners receiving the pension benefits sought in this case is that those benefits were forfeitable as defined in 29 C.F.R. § 2613.6. The PBGC, in this case, determined that the pension benefits claimed by Petitioners are forfeitable, and are not guaranteed. The position taken has resulted in essentially two issues being raised in this litigation. First, whether as a matter of law the claimed benefits are nonforfeitable, and second, whether the decision of the PBGC was arbitrary, capricious, or an abuse of discretion. In this case, as a matter of law, the claimed benefits are nonforfeitable and the decision of the PBGC was arbitrary, capricious and an abuse of discretion, thereby entitling the Petitioners to the pension benefits sought under either theory.

1. THE DENIAL OF PETITIONER'S CLAIM FOR PENSION BENEFITS IS IN CONTRAVENTION OF STATUTES AND REGULATIONS REGARDING THE PBGC, AS WELL AS THE CONGRESSIONAL INTENT BEHIND PBGC.

In determining whether or not a benefit is nonforfeitable, the definition of that term must be examined. Initially, 29 U.S.C. § 1002(19), in relevant part, provides:

> The term "nonforfeitable" . . . means a claim obtained by a participant . . . to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan.

What is evident from the words "which arises from the participant's **service**" is that the focus is on guaranteeing benefits which accrue because the participant **earned** them, and, because the participant earned them, they were vested regardless of the trigger for receiving the benefit.[1] Further, 29 C.F.R. § 2613.6(a) provides:

> For the purposes of this part, a benefit payable with respect to a participant is considered to be nonforfeitable, if on the

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[1] 29 U.S.C. § 1053 details several instances in which a benefit "shall not be treated as forfeitable", none of which illuminate the issue in this case.

> date of termination of the plan **the participant (or beneficiary) has satisfied all of the conditions required of him under the provisions of the plan to establish entitlement to the benefit,** except the submission of a formal application, retirement, completion of a required waiting period, or death in the case of a benefit that returns all or a portion of a participant's accumulated mandatory employee contributions upon his or her death.

(Emphasis added). The plain language of the regulation requires that once **the participant under the provisions of the plan** has met all plan requirements that are within **the participant's control** prior to the plan termination date (with certain limited exceptions such as retirement or application submission) the benefit so earned is nonforfeitable. If nonforfeitability were to be determined by factors external to and not under the control of a plan participant the words "of him" would have been omitted. Further, such an interpretation is in accord with the very idea which the PBGC was created to implement, i.e., to protect vested pension plan participants from the loss of a pension when a shutdown of the operation occurs and/or the pension plan does not have enough assets, simply because the participant did not retire before shutdown. In fact, this Court, in *Nachman Corp. v. Pension Benefit Guarantee Corp.*, 446 U.S. 359, 375, 64 L.Ed.2d 354, 100 S.Ct. 1723, reh den 448 U.S. 908, 65 L.Ed.2d 1137, 100 S.Ct. 3051 (1980) recognized this intent.

Therefore, the law requires that the Petitioners receive the benefits they seek in this action, as they met all of the requirements of the plan which were in their control. The findings to the contrary by the Courts and PBGC contravene the law and regulations behind and controlling the PBGC. It is undisputed that the only "requirement" that PBGC claims was not met by the Petitioners prior to the plan termination date was a break in continuous service due to layoff. Whether or not the Petitioners were to be laid off is something which is not within their control, as recognized by the express language of §§ 5.06 and 5.07 of the plan. The Courts overlooked or misapprehended this fact in rendering their respective decisions, including the implicit determination that a break in continuous service was required prior to the plan termination date which is nothing more than a triggering event such as retirement and which is expressly excepted by the regulation in question. Under this interpretation no vested plan participant would receive retirement benefits if their service was halted after the plan termination date, an interpretation which would leave millions of American workers vulnerable to loss of pension benefits, and would give a tempting loophole for employers to draft into plan documents to avoid obligations to their employees. The law requires that the Petitioners be provided the benefits they seek, otherwise, artificial barriers to guaranteed benefits would be authorized, thereby depriving employees of their pension benefits.

Allowing the determination made by the PBGC, the Trial Court and the Tenth Circuit to stand, would send a message encouraging employers to create pension plans which require such artificial barriers, to allow employers to avoid their responsibility to the PBGC, and undermine the purpose of the PBGC. Depriving plan participants of retirement benefits would become a mere function of the timing of a layoff or other separation encouraging plan underfunding (non-contribution) in favor of continuing business operations and effectuating delayed

layoffs/separations/plant shutdowns and greater financial loss of pension benefits by participants. Such a result is unpalatable, and completely unjust. Business losses should be placed upon and borne by the plan participants.

The legislative record by both Representatives and Senators established the intent of ensuring the payment of all nonforfeitable benefits pursuant to the terms of and as defined by the plan. See e.g., 120 Cong. Rec. H4280 (Daily ed. Feb. 26, 1974). Rep. Dent said:

> This provision will provide a backup guarantee to every pension plan that, regardless of the economic fortunes of the companies sponsoring the plan, its obligations will be met.

See also 120 Cong. Rec. H29194 (Daily ed. Aug. 20, 1974), in the statement of Rep. Biaggi:

> If the company becomes insolvent, the insurance program pays the worker his pension under any and all circumstances.

See also 120 Cong. Rec. H29200 (Daily ed. Aug 20, 1974), statement of Rep. Ullman:

> Under the conference bill, all vested basic retirement benefits of covered defined benefit plans are insured up to the insurance limitations - other than benefits vesting only because of termination as a result of Internal Revenue Code requirements. In addition, any nonbasic benefits the company elects to insure would also be covered.

See also 120 Cong. Rec. H29206 (Daily ed. Aug. 20, 1974), statement of Rep. Brademas:

> [T]his legislation would help meet the problem of involuntary plan termination . . . by providing an insurance plan which guarantees payment of vested benefits if a pension fund terminations without sufficient assets to meet its obligations.

See also 120 Cong. Rec. S29929 (Daily ed. Aug. 22, 1974), statement of Sen. Williams:

> We are . . . [p]roviding an insurance system which will protect employees and their beneficiaries in their vested pension rights, despite premature plan termination.

Later that same day, at 120 Cong. Rec. S29931, he added:

> Accordingly, the conference substitute, as did the Senate and House bills, establishes an insurance program to protect employees against the loss of vested benefits in the event of plan termination.

See also 120 Cong. Rec. S29935 (Daily ed. Aug. 22, 1974), statement of Sen. Javits:

> Employees would have the right to government insurance of their pension benefits - similar to FDC insurance of bank deposits - which would guarantee that in the event their plan terminates with insufficient funds, their vested pension benefits would be paid up to a maximum limit of $750 monthly - but not to exceed 100 percent of their compensation over their highest five years.

It is clear from the foregoing that the legislative intent was to guarantee pension benefits. The theme is repeated, often

in identical words, by representatives and senators throughout 1974, the year of ERISA's enactment. See e.g. 120 Cong. Rec. S29952 (Daily ed. Aug. 22, 1974), statement of Sen. Nelson:

> [ERISA has] the very simple goal that workers have a right to the pensions they have been promised.

See also the article from U.S. News and World Report, Aug. 26, 1974 (reprinted in 120 Cong. Rec. S29957, inserted by Sen. Ribicoff), which included the following quote:

> [A] new Pension Benefit Guaranty Corporation is to insure all of a worker's vested benefits up to certain limits, effective July 1, 1974. 120 Cong. Rec. S29958.

See also the Department of Labor ERISA summary, printed at 120 Cong. Rec. S31064 (Daily ed. Sept. 12, 1974) by direction of Sen. Javits:

> Generally, PBGC will guarantee that when a plan covered by its insurance terminates without having sufficient assets to provide promised benefits, participants will not lose vested benefits. 120 Cong. Rec. S31066.

Clearly, then, the purpose of the PBGC is to avoid leaving employees without a pension through lack of funding by an employer for the pension benefits they earned via requirements they can control. The issue of nonforfeitability is of great importance, and should be determined by this Court. Accordingly, then, this Petition should be granted, to ensure that the statutes, regulations and congressional intent behind the creation of the PBGC are met.

2. THE EMPLOYEES ARE ENTITLED TO THE PENSION BENEFITS SOUGHT, AS THE DECISION TO DEPRIVE THE EMPLOYEES OF SUCH BENEFITS IS ARBITRARY, CAPRICIOUS AND/OR AN ABUSE OF DISCRETION.

The PBGC's entire basis for denying the Petitioners' claims is its contention that a break in continuous service by layoff had not occurred prior to the plan termination date and that such an event was a requirement of the plan but did not constitute a "retirement". However, it undisputed that PBGC determined that certain individuals, including some of the Petitioners were entitled to a guaranteed pension pursuant to § 5.08 of the plan. § 5.08 of the plan, in pertinent part, requires:

> . . . Any Participant not eligible to receive a pension under any other provision of this Section V **whose Continuous Service is broken on or after October 31, 1985 for any reason,** and who at the time of such break in Continuous Service shall have had at least ten (10) prior to January 1, 1989, and five (5) subsequent to December 31, 1988, years of Continuous Service, shall be eligible for a pension . . .

(Emphasis added). Based upon the logic asserted by the PBGC, the Trial Court and the Tenth Circuit, none of the Petitioners could qualify for a § 5.08 pension, as the break in continuous service, which encompassed the break in continuous service referred to in §§ 5.06 and 5.07 of the

plan, did not occur prior to the plan termination date. The only logical result is that the PBGC treated a break in continuous service as a "retirement" as that term is used in 29 C.F.R. § 2613.6(a). For PBGC to contend otherwise is arbitrary, capricious, an abuse of discretion and permits the creation of artificial barriers to guaranteed benefits. Further, an interpretation guaranteeing payment of pension benefits to participants regardless of whether the "layoff" occurred prior to or after plan termination is in accord with the purpose and intent behind the creation of the PBGC as recognized in *Nachman, supra.* To hold otherwise allows employers to avoid the very reasons the PBGC was created.

The Trial Court and the Tenth Circuit, in rendering its decision could not have considered the foregoing, as the PBGC's actions are clearly arbitrary, capricious, and an abuse of discretion, in that PBGC allows participation under one section of the plan, while denying participation under another section of the plan with essentially the same requirement. Accordingly, *Olenhouse, supra,* as well as 5 U.S.C. § 706 require that the prior decisions rendered be overturned, including on the grounds that no rational connection exists between the facts found and the decision rendered.

CONCLUSION

The Trial Court and the Tenth Circuit have decided important questions of federal law that have not been, but should be settled by this Court. The future existence of the PBGC as intended by Congress is at stake, as well as the peace of mind and pension benefits of millions of workers in this Country. If the decisions rendered to date are allowed to stand, depriving plan participants of retirement benefits will become a mere function of the timing of their layoff or separation from employment, an event not within their control, and will encourage plan underfunding (non-contribution) in favor of continuing business operations.

Such a result, shifting business loss upon plan participants and risking the very pensions the PBGC was created to protect is unpalatable and unjustifiable. Accordingly, this issue should be reviewed by this Court. Further, the arbitrary and capricious way in which the PBGC determines benefits should also be reviewed, as otherwise numerous individuals will be deprived of the very benefits the PBGC is to ensure. Justice, equity and substantial fair play require that this Petition be granted.

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App. 1

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DATED DECEMBER 23, 1996 UNPUBLISHED

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

CHARLES R. FETTY; ALFRED D. AGUERO; ARTHUR A. AGUERO; DAVID L. ALEXANDER; HILARIO ALFONSO, JR.; DAVID R. ALLEE; ROBERT JOHN APODACA; EDWARD J. ARAGON; VIRGIL R. ARAGON; LAWRENCE A. ARCHULETTA; ROBERT ARCHULETA; KENNETH R. ARKO; CRISTOBAL ARMIJO, JR.; JOHN EDWARD ARMIJO; RICHARD L. ARMSTRON; EMANUEL AVILLA; SIMON A. AYALA; JOE LOUIS BACA; RICHARD J. BACA; DALE W. BANDY; BASILIO A. BARELA; DAMIAN EDUARDO BARELA; EUGENE S. BARELA; JOHNNIE T. BASTA; MICHAEL JOSEPH BECHAVER; ROBERT BELTRAN; WILFRED BENITEZ; LAUNNIE S. BIRCH; GARY BLATNICK; ALEXANDER PHILLIP BONATA; FRANK M. BONETTA; PHILIP J. BOYER; ROGER EARL BRAUN; WILLIAM O. BROWN; MILLARD J. BUCKLEY; BARRY BURBIDGE; LAWRENCE W. BURRY; THOMAS R. BUSTAMANTE; CHARLES BUSTILLOS; FREDERICK L. CAGE; CARMEN S. CARLO; EDWARD M. CARLSON; JOHN E. CARRILLO; JAMES L. CATRON; ANTHONY A. CESARIO; ARNOLD E. CHACON; DIXIE ELAINE CHAPO; GEORGE CHAPO; MICHAEL D. CHAPPELL; RICHARD LEON CHOCKLEY; JAMES L. COATS; STEVE COCA; CLARENCE C. COCHRAN; PAUL A. COCHRAN; DAVID E. COLBY; GARY M. COLE; MARTIN A. COLE; CECIL E. (GENE) COMSTOCK; JAMES R. CONNOR; JOHN R. CONNOR; DELFIN N. CORDOVA; JERRY A. CORDOVA; PATRICK L. CORDOVA; CARLOS Z. CORTEZ; DELBERT ANDY COTTRELL, JR.;

JOHN J. COURTNEY; JIM R. CRUZ; JOSE G.F. CRUZ; FREDERICK L. DAVIS; JOSEPH DAZZO; JOE P. DE GRADO; ELOY R. DELGARDO; JOHN D. DEVRIES; CHARLES V. DIONESE; WILLIAM D. (DINO) DISALVO; RICHARD P. DISSLER; STANLEY A. DOWD; MARVIN HENRY DREWES; JOHN R. DUNLAP; JOSE D. DURAN; THOMAS V. DURAN; LARRY L. DWYER; MERLYN D. EALEY; TIMOTHY L. EAST; EUGENE T. EDWARDS; JERRY L. EMERSON; ELMER C. ESPINOZA; ERNESTO S. ESQUIBEL; SHANNON FAIR; CARLOS LOUIS FERRIS; CHARLES R. FERRY; ALVIN C. FETTY; CARL L. FETTY; GLENN R. FINNEY; LIBERATO FLORES; JACK E. FOGLE; A.D. FRANKLIN; JOYCE E. GALLARDO; JOHN J. GALLEGOS; NESTOR A GALLEGOS; JOSEPH L. GARBISO; DOMINGO A. GARCIA, JR.; FRANCISCO GARCIA; GERALD A. GARCIA; JOHN GARCIA; JOSE S. GARCIA; LEROY E. GARNER; ELMER C. GILBERTSON; EUGENE GIORDANO; JOSEPH A. GODINEZ; CARL A. GOMEZ; JOHN GOMEZ; GABRIEL GONZALEZ; RICHARD M. GONZALES; JOE F. GORSHE; JAMES A. GREGG; MANUEL A. GUTIERREZ; WILLIAM L. HAMLER; HARRY F. HANEY, JR.; RALPH P. HART; DON HEADRICK; VERNON L. HELLER; LEROY E. HENSLEY; ELIAS HERNANDEZ; ERNEST A. HERNANDEZ; JAMES G. HERNANDEZ; GENE P. HILL; GEORGE C. HILL; ALBERT R. HUME, JR.; RONALD L. HUSTON; THEODOR (TED) JAQUEZ; ARTHUR E. JOHNSON, JR.; CARL L. JOHNSON; HENRY W. JOHNSTON; ALEXANDER J. KAISER, III; JOSEPH A. (ANTHONY) KENICK; JOHN J. KNAFELC; STAN KROL; FILBERT F. LA CRUE; DONALD R. LADD; RICHARD D. LANGE; ROBERT LE TURGEZ; KENNETH D. LEWIS; ERNEST P. LINDLEY; GEORGE E. LINGO, III; GERALD C. LONG; ALFRED R. LORETO; JOHN A. LOVATO; JESSE J. MAEZ; TELESFOR F. MAES; JOSEPH B. MAHANEY; JIMMIE A . MANN; ARTHUR LEVIER MARTINEZ; BEN H. MARTINEZ; CARL J. MARTINEZ; FRED A. MARTINEZ; JAMES E. MARTINEZ; JAMES M. MARTINEZ; JOSE S.

MARTINEZ; LEONARDO F. MARTINEZ; MACLOVIO MARTINEZ; PAUL E. MARTINEZ; RENALDO G. MARTINEZ; DAVID MATHEWS; LARRY LEON MC CARTEE; JIM E. MC CARTY; RICHARD L. MC DOUGAL; HENRY J. MEDINA; RAMON MEDINA; ROSS W. MEDINA; RUBEN MEDINA; JON K. MIHALICK; BILLY L. MILLER; GLENDLE F. MILLER; LEONARD G. MINO; ROBERT M. MONCIVAIZ; LLOYD V. MONTIEL; ANDY MONTOYA; JOE L. MONTOYA; LEO R. MONTOYA; PEDRO E. MONTOYA; ROBERT MONTOYA; DAVID T. MOORE; FREDRICK L. MOSHER; TOMMY MUNOZ; RICHARD C. MUSSO; REYMUNDO MAJERA; ROBERT W. NELSON; LAWRENCE A. NOGA; JAMES L. OROZCO; ERNIE L. PACHECO; HOWARD E. PACHECO; JOE P. PACHECO; NICK P. PANTAZES; JOHN E. PARKER; GEORGE RICHARD PAVLIN; RONALD D. PEITZ; MICHAEL (MIKE) G. PERRY; SANDY L. PERRY; ROBERT J. PLUTT; WILLIAM M. PLYMELL; DONALD D. POLK; LOUIS D. POTOKAR; GEORGE L. PRIEN; HOMER L. PRUETT; ROGER PRUITT; PAUL EVERETT PULIDO; ROBERT J. QUINTANA; DOMINIC C. RADOSTA; ROBERT RAMIREZ; ARTHUR M. RAMPA; JOHN M. RAMPA; RONALD L. RANSON; RALPH REDMAN; LOUIS L. RICCILLO; ANTHONY D. RIVAS; JOSEPH F. RODRIGUEZ; TERRY ROGERS; ALEX A ROITZ, JR.; TIMOTHY C. ROLDAN; JAY E. ROM; ANTHONY L. ROMERO; BENJAMIN A. ROMERO; LEONARD R. ROMERO; SECUNDINO ROMERO; RAYMOND L. ROSEMAN; ANGELO J. ROTONDO; LLOYD RUSSEAU; HERBERT ST. CLAIR; DOMINICK A. SALAMENO; ENASO G. SALAS; JOSEPH A. SANCHEZ LAWRENCE SANDERS; JAKE A . SANDOVAL; LOUIS J. SANDOVAL; JAMES D. SANFORD; THOMAS SANTILI; JAMES A. SHAFFER; STANLEY H. SHAUFLER; LEROY SHOBLO; MICKEY L. SMITH; PHIL T. SMITH; RAYMODN SMITH, JR.; WALTER SMITHOUT; REGINALD G. SNIFF; RONALD E. SNIFF; LEWIS O. SNOW; VICTOR E. SOLANO; JAMES D. SOTO; SAMUEL SOTO; EVERAL R. SPERRY; DAVID E. SPINUZZI; THOMAS L. SPRAGUE, SR.;

STEVEN M. STEFANIC, JR.; LAWRENCE V. STEVENS; FRED E. STORM; ROBERT L. STURTEVANT; JAMES J. STYDUHAR; TOMMY SUAREZ; ROBERT M. SUTTON; JAMES SWOPE; MICHAEL E. SWOPE; RONALD WAYNE SWOPE; JOE TAULLIE; CHARLES T. TORRES; JUAN F. TORRES; DAVID J. TRACY; ALDEN L. TRIMBLE; KENTON E. TRIMBLE; HAROLD TRUJILLO; JOSEPH B. TRUJILLO; JOSEPH T. TRUJILLO; MARK V. TRUJILLO; SIMON PATRICK TRUJILLO; JOHN L. ULIBARRI; BENJAMIN VALDEZ; SIMMON VAUGHT; LEROY L. VELARDE; GENE N. VELASQUEZ; JOSE E. VIALPANDO; ANTHONY S. VIGIL; JOHN M. VIGIL; JOSEPH L. VIGIL; LOUIS G. VIGIL, JR.; ALBERT E. VILLA; TOMAS G. VILLARREAL; JOHN J. VOLK, JR.; DONALD W. WALKER; DAVID L. WATKINS; EARL E. WEAR; ROBERT CHARLES WILLIAMS; CLIFFORD F. WILLS; JOSEPH S. WILSON; JAMES W. WINGARD; ROBERT A. WISE; AND WILLIAM J. WOLGRAM;

Plaintiffs-Appellants,

v.

No. 96-1106
(D. Ct. No. 95-K-336)
(D. Colo.)

PENSION BENEFIT GUARANTY CORPORATION,

Defendants-Appellees.

ORDER AND JUDGMENT[1]

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[1] This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. This court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of

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Before TACHA, McWILLIAMS, and BALDOCK, Circuit Judges.

Plaintiffs appeal the district court's February 20, 1996 Memorandum Opinion and Order affirming the determination of defendant Pension Benefit Guaranty Corporation ("PBGC") and dismissing plaintiff's appeal. Plaintiffs contend that PBGC's decision to deny early retirement benefits under the terminated retirement plan of their former employer was arbitrary, capricious and contrary to law. We exercise jurisdiction pursuant to 28 U.S.C. § 1291 and affirm.

PBGC's interpretation and application of its own regulation is entitled to substantial deference. PBGC's determination must be upheld unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(a). We must render an independent decision and apply the same standard of review as the district court. Olenhouse v. Commodity Credit Corp., 42 F.3d 1560, 1580 (10th Cir. 1994) (citation omitted). Under the arbitrary and capricious standard of review we evaluate "whether the agency examined the relevant data and articulated a rational connection between the facts found and the decision made." Olenhouse, 42 F.3d at 1574 (citation omitted).

We agree with the district court that PBGC correctly interpreted applicable law in its decision to deny plaintiffs'

10th Cir.R. 36.3

applications for 70/80 and Rule-of-65 benefits under the Plan. PBGC's action was neither arbitrary nor capricious. Plaintiffs had not suffered a break in continuous service by reason of a layoff as of the Plan termination date. See 29 C.F.R. § 2613.3 We reject plaintiffs' attempt to equate "layoff" in sections 5.06 and 5.07 of the Plan with "retirement" in 29 C.F.R. § 2613.6. Therefore, we AFFIRM for substantially the reasons given by the district court.

ENTERED FOR THE COURT

Deanell Reece Tracha
Circuit Judge

App. 7

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO DATED DECEMBER 15, 1996 CITED AS 915 F.SUPP. 230 (D.Colo. 1996)

Charles R. FETTY, et al., Plaintiffs,

v.

PENSION BENEFIT GUARANTY CORPORATION, Defendant.

Civil Action No. 95-K-336.
United States District Court,
D. Colorado.
Feb. 20, 1996.

MEMORANDUM OPINION AND ORDER

KANE, Senior District Judge.

Three hundred former employees of a defunct steel corporation appeal from a decision of the Pension Benefit Guaranty Corporation (PBGC) [FN1] denying them early retirement benefits under the corporation's terminated retirement plan. The employees contend they were entitled to these benefits under the federal statutes and regulations governing the PBGC, and argue the PBGC's decision was arbitrary, capricious and contrary to law. Based on my review of the record, I *232 find PBGC examined the relevant data and articulated a rational connection between the facts presented and the decision made. Therefore, I affirm.

FN1. The PBGC is a government-owned corporation established under Title

IV of the Employee Retirement Income Security Act of 1974 (ERISA) to

administer the nation's pension plan termination insurance system. 29

U.S.C. s 1302. It is an entity "within the Department of Labor" whose

Board of Directors is composed of the Secretaries of Labor, Treasury and

Commerce. Id.

I. REGULATORY FRAMEWORK

This case concerns the guaranteed benefit provisions of Title IV of the Employee Retirement Income Security Act of 1974, 29 U.S.C. ss 1301-1461 (ERISA). The PBGC, whose Board of Directors consists of the (Secretaries of Labor, Treasury and Commerce) is a government-owned corporation charged with administering the nation's pension plan termination insurance program under Title IV of ERISA. Id., s 1302. The purpose of Title IV is to provide for the timely and uninterrupted payment of pension benefits to participants and beneficiaries under plans to which it applies. Id.

When an underfunded pension plan terminates, PBGC takes over the assets of the plan as statutory trustee. 29 U.S.C. ss 1341(c), 1342. PBGC then pays guaranteed benefits to plan participants and beneficiaries. Id., ss 1322, 1361. Subject to certain statutory limitations, the PBGC guarantees "all nonforfeitable benefits (other than benefits becoming nonforfeitable solely on account of the termination of a plan) under a single-employer plan which terminates at a time when [Title IV] applies to it." 29 U.S.C. s 1322(a). Under PBGC's guaranteed benefit regulation, a benefit "is considered to be nonforfeitable if on the date of termination of the plan, the participant ... has

satisfied all of the conditions required of him under the provisions of the plan to establish entitlement to a benefit...." 29 C.F.R. s 2613.6(a).

II. FACTS AND PROCEDURAL HISTORY

CF & I Steel Corporation ("Old CF & I") of Pueblo, Colorado established a retirement plan (the "Plan") to provide various types of retirement benefits to employees of the company and its subsidiaries. Under the Plan, participants were eligible for "Normal Retirement" (generally starting at age 65) with monthly benefits based on the number of years of continuous service. Alternatively, participants with sufficient years of continuous service could elect to receive a reduced early retirement benefit at age 60.

The Plan also provided certain types of unreduced early retirement benefits based on contingent events. Such benefits were conditioned upon the occurrence of a permanent shutdown of a facility, layoff, or physical disability, and a resulting break in continuous service. Depending on the facts, eligible participants could receive such pensions at age 55 or earlier. Section 5.06 of the Plan provided:

> 70/80 Retirement. Any Participant who has not attained the age of sixty-two (62) years and who shall have had at least fifteen (15) years Continuous Service, and (i) shall have attained the age of fifty-five (55) years, and whose combined age and years of Continuous Service shall equal seventy (70) or more, or (ii) whose combined age and years of Continuous Service equal eighty (80) or more, and:

> (a) whose Continuous Service is broken by reason of a permanent shutdown of a plant, department or subdivision thereof, or by reason of a layoff or physical disability
>
> * * *
>
> shall be eligible to retire on or after October 31, 1985, and shall upon his retirement (hereinafter "70/80 retirement") be eligible for a pension....

R. at 291-92. Section 5.07 of the Plan provided:

> Rule-of-65 Retirement. Any Participant (i) who shall have had at least twenty (20) years of Continuous Service as of his last day worked, (ii) who has not attained the age of fifty-five (55) years, and (iii) whose combined age and years of Continuous Service shall equal sixty-five (65) or more but less than eighty (80), and
>
> (a) whose Continuous Service is broken by reason of a layoff or disability
>
> * * *
>
> shall be eligible to retire on or after October 31, 1985, and shall upon his Retirement *233 (hereinafter "Rule-of-65 retirement") be eligible for a pension....

R. at 292.

Finally, the Plan provided a Deferred Vested Pension for participants who were employed 10 years (or in some cases 5 years) before a break in continuous service. R. at

292-93. The Deferred Vested Pension was a monthly benefit starting at age 65 or 62. Alternatively, a Deferred Vested participant with at least 15 years continuous service could elect to receive this benefit in a reduced amount at age 60. R. at 300.

On November 7, 1990, Old CF & I filed a petition under Chapter 11 of the Bankruptcy Code. In re CF & I Fabricators of Utah, Inc., Case Nos. 90B-6721 to -6730 (Bankr.D.Utah). In March 1992, the PBGC determined the Plan was underfunded and should be involuntarily terminated pursuant to 29 U.S.C. s 1342. By agreement with the Plan administrator, the Plan was terminated effective March 19, 1992, and PBGC was appointed statutory trustee. See id., ss 1341(c), 1322, 1342, 1361.

Old CF & I continued to operate while in bankruptcy for nearly a year. On or about March 3, 1993, Old CF & I sold most of its assets to CF & I Steel, L.P. ("New CF & I"), an unrelated Oregon company, pursuant to a plan of reorganization confirmed by the bankruptcy court. On that date, many or all of the Employees were laid off by Old CF & I. [FN2]

> FN2. As stated in oral argument, most of the laid off workers were hired by New CF & I at the same facility. See, e.g., R. 1472, 1507 (benefits applications of A. Aguero and D. Alexander showing applicants presently employed at "CF & I L.P." in Pueblo).

Employees began filing applications with the PBGC in 1994 for 70/80 Retirement or Rule-of-65 Retirement under Old CF & I's terminated Plan. Counsel for Employees

and the PBGC exchanged a series of letters from January 1994 to December 1994, [FN3] culminating in the PBGC's December 23, 1994 initial determination that Employees were not entitled to the benefits sought. (R. 1438-53.) PBGC reasoned the benefits were not "nonforfeitable" (and, therefore, not guaranteed under PBGC's guaranteed benefit regulation) because the layoff triggering Employees' eligibility occurred one year after the Plan was terminated. R. at 1438-39. This action ensued.

FN3. These letters are reproduced and included in Volume IV of the Administrative Record. Informal letters stating PBGC's position regarding Employees' entitlement to benefits were written on March 3, 1994 (R. 1277-79) and July 1, 1994 (R. 1362-67).

III. ISSUE ON APPEAL

Employees seek a declaratory judgment pursuant to Fed.R.Civ.P. 65 that the PBGC's denial was "plainly erroneous, arbitrary and capricious and contrary to the applicable statutes and the PBGC's own regulations." Pls.' Compl., P 15. In a separate request for relief, Employees invoke the court's equitable powers and seek an order (1) requiring the PBGC to calculate, account and report to Employees the amount of monthly early retirement benefits owed each of them; (2) entering judgment in Employee's favor for damages in the amount of benefits lost; and (3) enjoining the PBGC from "acting in any manner inconsistent with the judgment of this court." Id., PP 16-17. [FN4]

FN4. Employees initially sought to have this lawsuit proceed as a separate and independent action against the PBGC, subject both to discovery and traditional motions practice. See Pls.' Mot. for De Novo Review and to Conduct Discovery (filed Aug.

18, 1995). I denied the motion and determined Employees challenge to the PBGC's final agency action would be treated as an appeal and reviewed on the administrative record in accordance with the Administrative Procedures Act, 5 U.S.C. s 701 et seq. See Order, No. 95-K-336, slip op. at 3 (Nov. 2, 1996) (citing Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416, 91 S.Ct. 814, 824, 28 L.Ed.2d 136 (1971) and Olenhouse v. Commodity Credit Corp., 42 F.3d 1560, 1573-75 (10th Cir.1994)).

Employees argued at the administrative level and now on appeal that, with the exception of experiencing a "break in Continuous Service by reason of a layoff," they had satisfied all the conditions for 70/80 and Rule-of-65 Retirement benefits under the Plan before its March 19, 1992 termination date. Because post-termination "retirement" affects neither participants' eligibility for *234 benefits under 29 C.F.R. s 2613.5(a)(3) nor the nonforfeitability of those benefits under s 2613.6(a), Employees maintained they were entitled to their 70/80 or Rule-of-65 benefits notwithstanding their post-termination "retirement."

The PBGC rejected Employees' efforts to equate the contractual term "layoff" with the regulatory term "retirement" and explained Employees' construction of s 2613 was contrary both to the plain language of the regulation and legislative intent. PBGC determined the occurrence of a "layoff" or similar break in continuous service was a substantive, rather than procedural, condition for eligibility under the Plan, and found the fact no "layoff" had occurred as of the Plan termination date fatal to Employees' claims. The issue on appeal is whether this

determination was arbitrary, capricious or otherwise contrary to law.

IV. STANDARD OF REVIEW

Because there is no obligation for applicants to exhaust administrative remedies before seeking review of an initial PBGC determination, see 29 C.F.R. s 2606.23(b), the December 23, 1994 letter constituted final agency action for the purposes of judicial review under the APA. Upon review, an agency's interpretation and application of its own regulation is entitled to substantial deference. Renfro v. City of Emporia, 948 F.2d 1529, 1537 (10th Cir.1991); see Nachman Corp. v. PBGC, 446 U.S. 359, 373-74, 100 S.Ct. 1723, 1732, 64 L.Ed.2d 354 (1980) (Court could not reject PBGC's construction of "completely unambiguous" definition of "nonforfeitability" in 29 C.F.R. s 2613.6(a) without careful examination of Title IV's legislative history). The interpretation will be upheld unless the agency (1) acted outside the scope of its authority; (2) failed to comply with prescribed procedures; or (3) the agency's action was otherwise arbitrary, capricious or an abuse of discretion. American Petroleum Inst. v. EPA, 540 F.2d 1023, 1029 (10th Cir.1976) (citing Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415-17, 91 S.Ct. 814, 823-24, 28 L.Ed.2d 136 (1971)). Only the third transgression is alleged in the instant case.

The duty of a court reviewing agency action under the "arbitrary or capricious" standard is to ascertain whether the agency examined the relevant data and articulated a rational connection between the facts found and the decision made. Olenhouse v. Commodity Credit Corp., 42 F.3d 1560, 1574 (10th Cir.1994) (citing Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co., 463 U.S. 29, 43, 103 S.Ct. 2856, 2867, 77 L.Ed.2d 443 (1983)).

As long as the agency articulated a reasoned basis for its action and the action is supported by substantial evidence in the administrative record, it will be affirmed. [FN5]

FN5. Employees assert at pp. 4-5 of their Reply that the PBGC's determination was "unwarranted by the facts to the extent that the facts are subject to trial de novo " under 5 U.S.C. s 706(2)(F). Plaintiffs misapprehend the distinction between review of formal, versus informal, agency determinations. Informal agency action must be set aside if it fails to meet statutory, procedural or constitution requirements or if it was "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law." Overton Park, 401 U.S. at 413-14, 91 S.Ct. at 822 (construing s 706(2)(A)-(D), the "generally applicable" standards of review), discussed in Olenhouse, 42 F.3d at 1574 & n. 23). The standards of review at s 706(2)(E) and (F) apply only to review of formal agency action, i.e., decisions made on the record of an agency hearing provided for by statute. Id. at 414, 91 S.Ct. at 822. The determination at issue here was an informal agency action subject to review under s 706(2)(A)-(D). That does not mean that a determination by the PBGC unwarranted by the facts will survive review. To the contrary, informal agency action will be set aside as arbitrary if it is unsupported by "substantial evidence". See Olenhouse at 1574 (citing Association of Data Processing v. Board of Governors, 745 F.2d 677, 683 (D.C.Cir.1984) (Scalia, J.)).

V. DISCUSSION

For the purposes of Employees' benefits applications, the following facts were undisputed: The Plan was terminated on March 19, 1992; Employees met the age and service requirements for 70/80 and Rule-of-65 Retirement benefits as of the Plan termination date; but Employees did not experience a "break in Continuous Service by reason of layoff" until March 3, 1993, one year after the Plan termination date. Employees *235 argued the timing of the layoffs had no effect on the nonforfeitability of benefits they claimed had vested before the termination date. "Retirement (by reason of a layoff)," like the administrative process of "applying" for benefits, was a procedural formality that triggered a participant's right to payment regardless of when it occurred. See Letter from Deikman to Thomas dated March 24, 1994 ("March 24 Letter") at 3-6 (R. at 1299-1302).

Employees relied on s 2613.5 of PBGC's guaranteed benefit regulation as well as PBGC's Operating Policy Manual to support their argument. March 24 Letter at 4-5 (R. at 1300-01). PBGC was properly unpersuaded. Section 2613.5 provides that procedural post-termination events such as "retirement," "application for the benefit," or "satisfaction of a waiting period" will not affect a participant's entitlement to benefits. 29 C.F.R. s 2613.5(a)(3). Similarly, s 2613.6(a) states that the fact these events occur after a plan has terminated will not affect the nonforfeitability of otherwise payable benefits. In a caveat dispositive of the issue on appeal, however, both provisions make clear that they only apply if all substantive conditions of entitlement--such as the "break in Continuous Service by reason of layoff" required for entitlement to 70/80 or Rule-of-65 benefits under the Plan

here--were satisfied "before the date of plan termination." [FN6]

> FN6. The Operating Policy Manual upon which Employees rely contains a similar caveat. It is the policy of the PBGC to protect a participant's entitlement to benefits notwithstanding the occurrence of a post-termination separation from employment, but only "if he or she meets all other requirements for receipt of the benefit." Policy Statement of March 29, 1990 (quoted by Employees in March 24 Letter at pp. 5-6 (R. at 1301-02) (emphasis added).

Employees' ipse dixit attempt to equate the "layoff" requirement under the Plan with the word "retirement" as it is used in guaranteed benefit regulation is a transparent effort to expunge the former as a condition of entitlement to 70/80 or Rule-of-65 benefits. Because Employees had not suffered a "break in Continuous Service by reason of layoff" as of the Plan termination date, they are not entitled to benefits under the terms of the Plan. Even assuming, for the sake of argument, that post-termination layoffs could trigger entitlement to benefits under the Plan, the PBGC correctly determined those benefits would not be "nonforfeitable" under 29 C.F.R. s 2613.6(a).

I reject Employees' construction of 29 C.F.R. s 2613.5 and .6(a). I also reject Employees' other arguments on appeal. Specifically, I reject the Employees' suggestion at oral argument that Old CF & I and the PBGC conspired in their March 18, 1992 termination agreement to limit PBGC's liability for benefits under the Plan. Employees question the timing of PBGC's decision to terminate the Plan when it did. I agree we would create perverse incentives indeed if we permitted PBGC to solicit

agreements with employers for the post-termination shut-down of their businesses either to "puff up" the business's value or to help PBGC avoid the payment of benefits that accrue on that later shut-down or layoff date. However, there simply is nothing in the record or in the Old CF & I/PBGC termination agreement to suggest that was the case here.

I conclude PBGC's Initial Determination dated December 23, 1994 denying Employees' applications for 70/80 and Rule-of-65 benefits under the Plan correctly interpreted the applicable law and was neither arbitrary nor capricious. Accordingly,

The agency's action is AFFIRMED and the appeal DISMISSED.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DATED FEBRUARY 4, 1997

UNPUBLISHED

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

CHARLES R. FETTY, et al.,

Plaintiffs - Appellants

v. No. 96-1106

PENSION BENEFIT GUARANTY CORPORATION,

Defendant - Appellee.

ORDER

Entered February 4, 1997

Before TACHA, McWILLIAMS and BALDOCK Circuit Judges.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

PATRICK FISHER,

By: s/Audrey F. Weigel
Deputy Clerk

INITIAL DETERMINATION OF THE PBGC
DATED DECEMBER 23, 1994
UNPUBLISHED

PENSION BENEFIT GUARANTY CORPORATION
1200 K Street, N.W., Washington, D.C. 20005-4026

VIA FEDERAL EXPRESS

Eugene Deikman, Esq.
Suite 1200
1700 Broadway
Denver, Colorado 80290

Re: Pension Plan of CF&I Steel Corporation
and Certain Subsidiaries
Case No. 13345100

Dear Mr. Deikman:

I am writing in response to your letter to Garth D. Wilson dated September 29, 1994, requesting the Pension Benefit Guaranty Corporation ("PBGC") to expedite its administrative adjudication of certain claims of your clients.[1] In particular, you requested that the PBGC promptly issue an initial determination of whether your clients are entitled to 70/80 or Rule-of-65 retirement under the above-captioned terminated pension plan. this letter generally confirms the views of the Office of the General Counsel expressed in its letter to you dated July 1, 1994.

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[1] The names of your clients are listed in the enclosures to this letter.

It is undisputed that the Pension Plan of CF&I Steel Corporation and Certain Subsidiaries ("Plan") was a defined benefit pension plan sponsored by CF&I Steel Corporation ("Old CF&I) of Pueblo, Colorado. Old CF&I and its nine wholly-owned subsidiaries filed under Chapter 11 of the Bankruptcy Code on November 7, 1990. Effective March 19, 1992, the PBGC involuntarily terminated the Plan under section 4042 of ERISA, 29 U.S.C. § 1342. Pursuant to an agreement with the Plan administrator, the termination was effectuated and the PBGC was appointed statutory trustee of the Plan. Old CF&I's plan of reorganization was later confirmed by the bankruptcy court and became effective on March 3, 1993. Under this plan of reorganization, on March 3, 1993, most of Old CF&I's assets were sold to an unrelated purchaser, CF&I Steel, L.P. ("New CF&I").

As you acknowledged on page 3 of your letter to Rosemary Thomas dated March 24, 1994, "At the time of the pension plan termination, there was no layoff or break in Continuous Service." Rather, the layoff upon which your clients base their claims to 70/80 or Rule-of-65 entitlement occurred nearly a year after the Plan termination date of March 19, 1992. As the PBGC understands the facts, Old CF&I placed most or all of its employees in

layoff status on or about March 3, 1993. Following the layoff and sale, most Old CF&I employees were later hired as employees of New CF&I. Thus, most or all of your clients continued to be employed at the same plant in essentially the same jobs by the new employer.

As the PBGC has previously explained to you, section 4022(a) of ERISA, 29 U.S.C. § 1322(a), and the PBGC's guaranteed benefit regulation, 29 C.F.R. §

2613.3(a), both require that for PBGC to guarantee a benefit, it must be "nonforfeitable." The term "nonforfeitable" is defined by the regulation as follows:

> For purposes of this part, a benefit payable with respect to a participant is considered to be nonforfeitable, if on the date of termination of the plan the participant (or beneficiary) has satisfied all of the conditions required of him under the provisions of the plan to establish entitlement to the benefit, except the submission of a formal application, retirement, completion of a required waiting period, or death in the case of a benefit that returns all or a portion of a participant's accumulated mandatory employee contributions upon his or her death.

29 C.F.R. § 2613.6(a) (emphasis added).

Section 5.06 and 5.07 of the Plan list a number of conditions that must be met for a participant to be entitled to 70/80 retirement or Rule-of-65 retirement. Assuming for purposes of argument that all of your clients attained the required combination of age and years of service before the Plan termination date (i.e., March 19, 1992), the Plan further requires the occurrence of a specific triggering event. In particular, the participant's Continuous Service must be broken by reason of a "layoff," "permanent shutdown," or "disability."

Page 5 of your letter of March 24, 1994, made passing use of the term "shut down," but it appears that your argument is more precisely about a "layoff." Here the key fact is undisputed: most or all of your clients were

actively at work for Old CF&I on March 19, 1992. Rather than seeking to meet the Plan's unambiguous requirement of a "layoff, " your March 24 letter instead focuses on the word "retirement" as contained in the PBGC's guaranteed benefit regulation. As PBGC understands your argument, 29 C.F.R. § 2613.6(a) lists four exceptions to the general requirement that "on the date of termination of the plan the participant (or beneficiary) has satisfied all of the conditions required of him under the provisions of the plan . . . ." Because "retirement" is listed as one of the four exceptions, you conclude that it was unnecessary for your clients to under a layoff before March 19, 1992.

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We find several reasons to reject your conclusion. First, the sole item of ERISA legislative history that discusses shutdown benefits strongly implies that the statutory guarantee applies only where the triggering event occurs before plan termination. In the Senate floor debate of September 19, 1972, on S. 4 (a precursor to ERISA), Senator Javits and Nelson discussed the purpose of adding to the bill section 424 (the forerunner of the current ERISA section 4022(d), 29 U.S.C. § 1322(d)), which authorized the PBGC to insure "other classes of benefits." In this colloquy, Senator Javits explained:

> I have been informed that in the basic metal, metal mining, and related industries, pensions are payable upon the permanent shutdown of a plant, facility, such as a mine or plant railroad, department, or subdivision thereof, to employees who are 55 years of age or older, if the sum of the age of the employee plus his years of service is 70 or more, or if,

> irrespective of his age, such sum is 80 or more. . . .
>
> . . . After such a permanent plant shutdown has occurred and the employee's pension vested as a result, insurance coverage would of course apply under section 422(a). But sometimes -- perhaps often -- plant shutdowns and plan terminations may occur at the same time and under these circumstances insurance coverage would not attach because the vested pension had not been earned prior to plan termination, but in fact resulted from a plant shutdown which was coincidental with plan termination.

119 Cong. Rec. 30392-93 (Sept. 19, 1973) (emphasis added), reprinted in Senate Committee on Labor and Public Welfare, 94th Cong., 2d Sess., II Legislative History of the Employee Retirement Income Security Act of 1974 at 1815-16 (1976). From this item the PBGC discerned a clear congressional intent to guarantee such benefits only where the plan closing occurs prior to termination.

Turning secondly to the guaranteed benefit regulation itself, nothing in the provision you cited permits one to substitute the term "retirement" for the contractual term "layoff." On the contrary, sections 5.06 and 5.07 of the Plan expressly require that the participant's Continuous Service be broken by a "layoff," not merely a "retirement." Nowhere does either the Plan or the regulation declare that the term "layoff" is interchangeable with "retirement" or vice versa.

Third, the history of the guaranteed benefit regulation shows that your interpretation was never

intended by PBGC. The proposed regulation was published on June 5, 1975. 40 Fed. Reg. 24206, 24209 (1975). The final regulation was published on September 22,

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1975. 40 Fed. Reg. 4350, 43510 (1975).[2] The preamble to the final regulation points out that the proposed regulation did not include any of the four exceptions to the general definition of nonforfeitability:

> A number of comments pointed out that the proposal might be read as requiring satisfaction of the purely technical and administrative requirements of making an application or satisfying a waiting period for a benefit to be guaranteed. Accordingly, the final version of § 2605.5(a)(3) [now § 2613.5(a)(3)] specifies that a participant will be deemed entitled to a benefit if he has satisfied the conditions for entitlement ever [sic] though, as of the date of plan termination, he has not made formal application for the benefit, he has not actually retired, or he is in a waiting period required by the plan. Likewise, the definition of a nonforfeitable benefit contained in §

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[2] PBGC's guaranteed benefit regulation, originally at 29 C.F.R. pt. 2605, was redesignated at 46 Fed. Reg. 32575 (June 24, 1981), as 29 C.F.R. pt. 2613. In 1980, the provisions of 29 C.F.R. § 2613.6(a) were essentially codified under section 4001(a)(8) of ERISA, 29 U.S.C. § 1301(a)(8).

> 2605.6(a) [now § 2613.5(a)] has been clarified by explicitly providing that the submission of a formal application, actual retirement, or satisfaction of a waiting period required by the plan are not considered conditions which must be satisfied for a benefit to be nonforfeitable.

40 Fed. Reg. at 43410.

Thus, section 2613.5(a) of the final regulation was intended simply to assure that compliance with certain purely technical or administrative requirement of a plan (e.g., filing an application, satisfying a waiting period, or being formally put into retirement status by the employer) would not be a bar to nonforfeitability. Under the final regulation, these procedural conditions do not have to be satisfied before the plan termination date. As long as the participant satisfies the substantive conditions of the plan before its termination date, he is entitled to the benefit. By contrast, the requirement of a "layoff" in this case is a substantive condition of entitlement. Under the facts presented here, in order for a benefit under sections 5.06 or 5.07 of the Plan to be guaranteed, a participant must have undergone a "layoff" -- no less than have attained a certain combination of age and years of service -- before the Plan termination date.

Finally, PBGC's interpretation of the nonforfeitability requirement is entitled to substantial deference. See Nachman Corp. v. PBGC, 446 U.S. 359, 373-74 (1980)

(upholding definition of "nonforfeitable" in PBGC regulation). As the Supreme Court held in a leading case on

statutory interpretation, "[I]f the statute is silent or ambiguous with respect to a specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984). This principle also applies to an agency's interpretation of its own regulations:

> It is well established "that an agency's construction of its own regulations is entitled to substantial deference." . . . Because applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking perogatives, we presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers.

Martin v. OSHRC, 111 S.Ct. 1171, 1175-76 (1991) (quoting Lyng v. Payne, 476 U.S. 926, 929 (1986)). Indeed, the Court has deferred substantially to such agency interpretations for decades:

> When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order. . . . "[T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."

Udall v. Tallman, 380 U.S. 1, 16-17 (1965) (quoting Bowles v. Seminole Rock Co., 325 U.S. 410, 413-14 (1945)). See also Roberts v. Colorado State Board of Agriculture, 998 F.2d 824, 828 (10th Cir.) ("We defer

substantially to an agency's interpretation of its own regulations."), cert. denied, 114 S.Ct. 580 (1993).

Your letter of March 24, 1994, also cited provisions of the PBGC Operating Policy Manual on "Payment of Benefits to Working Retirees" dated March 29, 1990 ("Working Retirement Policy"). In particular, your letter quoted page 4 of the Working Retirement Policy regarding the "Sale of DoPT Employer's Assets." By its express terms, however, this policy applies to a participant only "if he or she meets all other requirements for receipt of the benefit." Thus, to suggest that the Working Retirement Policy supplies an independent basis for benefit entitlement outside the general requirement of nonforfeitability is plainly mistaken.

PBGC's Working Retirement Policy does apply to a number of former Old CF&I employees (excluding your clients) who met all of the conditions for other types of immediate retirement under the Plan (e.g., 30 year retirement or 60/15 retirement) before the termination date. Under the Working Retirement Policy, such Plan participants may receive guaranteed benefits even though they are employed in essentially the same jobs at the same

facility by New CF&I. The starting point under the Working Retirement Policy, nevertheless, is the requirement that a participant "meets all other requirements for receipt of the benefit." As for the type of immediate retirement benefits provided under sections 5.06 or 5.07 of the Plan, participants who failed to satisfy the necessary conditions before March 19, 1992, did not "meet all other requirements for receipt of the benefit."

Moreover, to the extent your clients seek to characterize the events surrounding the asset sale of March 3, 1993, as a "shutdown," the Working Retirement Policy strongly implies that shutdown benefits should be denied in such circumstances. The policy defines "shutdown benefit" to mean "a subsidized early retirement benefit that becomes payable when all or substantially all of an employer's operations at a facility cease, resulting in a loss of jobs that is expected to be permanent for all or substantially all of the employees at that facility who are participants in the plan." Working Retirement Policy at 4. It further provides:

> [T]he PBGC will scrutinize shutdown benefits and make case-by-case determinations of whether facility shutdowns have occurred. The purpose of these determinations is to ensure that shutdown benefits are not paid when employment has continued even if that employment is with a new employer.
>
> . . .
>
> The PBGC will pay shutdown benefits only if it determines that a shutdown has occurred. . . . A determination of whether a shutdown has occurred will be based on whether or not substantially all of the employer's operations have ceased, resulting in a loss of jobs that is expected to be permanent for all or substantially all of the employees at that facility who are participants in the plan. The sale of an employer's assets does not automatically constitute a shutdown.

Id. at 3, 6.

In the time since the PBGC's letter to you dated July 1, 1994, you have not brought to the PBGC's attention any additional facts, or attempted to rebut the PBGC's preliminary legal analysis. For the foregoing reasons, it is the PBGC's determination that none of your clients is entitled to 70/80 or Rule-of-65 retirement under the Plan. This letter does not

constitute for any individual an initial determination of any other benefits under the Plan.[3] This initial determination is effective on the date it is issued. There is no obligation to exhaust administrative remedies with respect to this determination by seeking review of it by the PBGC. See 29 C.F.R. § 2606.23(b). I hope this is responsive to your request for an expedited decision on this narrow issue.

Sincerely,

s/Bennie Hagans

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[3] Based on preliminary information, it appears that most of your clients will be entitled in the future to a deferred vested pension under section 5.08 of the Plan. In addition, as discussed in the PBGC's letter to you dated August 4, 1994, a small number of your clients appear to be entitled currently to reduced age 60 early retirement. Initial determinations regarding such benefits will be issued in the future.

Bennie Hagans
Acting Director
Insurance Operations Department

Enclosure

cc (w/enclosures):

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STATUTES AND REGULATIONS INVOLVED IN THE CASE

5 U.S.C. § 706

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall -

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be -

(A) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law;

(B) contrary to the constitutional right, power, privilege or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this

title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

29 U.S.C. § 1002(19)

The term "nonforfeitable" when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is to an accrued benefit derived from employer contributions shall not be treated as forfeitable merely because the plan contains a provision described in section 1053(a)(3) of this title.

29 C.F.R. § 2613.3

Except as otherwise provided in this part, the PBGC will guarantee the amount, as of the date of the plan termination, of a benefit provided under a plan to the extent that the benefit does not exceed the limitations in the Act and in § 2613.4 if -

(a) The benefit is nonforfeitable under § 2613.6;

(b) The benefit qualifies as a pension benefit as defined in § 2613.2; and

(c) The participant is entitled to the benefit under § 2613.5.

29 C.F.R. § 2613.6(a)

For purposes of this part, a benefit payable with respect to a participant is considered to be nonforfeitable, if on the date of termination of the plan the participant (or beneficiary) has satisfied all of the conditions required of him under the provisions of the plan to establish entitlement to the benefit, except the submission of a formal application, retirement, completion of a required waiting period, or death in the case of a benefit that returns all or a portion of a participant's accumulated mandatory employee contributions upon his or her death.